90-1080

NO._____

UNITED STATES SUPREME COURT
OCTOBER 1990 TERM

UNITED STATES OF AMERICA, RESPONDENT, v. KENNETH A. KOZEL, PETITIONER.	WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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(a) QUESTIONS FOR REVIEW

1. Whether an attorney who faced 18 months in jail as a result of a conviction for criminal contempt of court, was entitled to a trial by jury pursuant to the recent enactment of 18 U.S.C. 19 and the repeal of 18 U.S.C. 1(3).

2. Whether the sentence imposed on an attorney of the payment of $600.00 plus the performance of 5 criminal cases pro bono as a result of a conviction for criminal contempt of court, exceeded the maximum sentence of a $5,000.00 fine authorized by 18 U.S.C. 19 and thereby violated the attorney's right to a trial by jury.

3. Whether an attorney who received a permanent blot on his license to practice law and loss of his professional reputation as a result of a conviction for criminal contempt of court, was entitled to a trial by jury.

4. Whether a local rule of a United States District Court, which is not definite or specific, can be the basis of a conviction

for criminal contempt of court.

5. Whether a defendant attorney can be found guilty of criminal contempt of court for failure to appear at a hearing on a rule to show cause at which the presiding judge disqualifies himself.

6. Whether a criminal prosecution utilizing witness transcripts rather than live witnesses violates one's right to confront witnesses.

7. Whether the refusal of the trial judge to allow a defendant to call a government employee sitting in the courtroom as a witness violated the right to confront witnesses.

8. Whether a conviction for criminal contempt requires findings of willfulness and guilt beyond a reasonable doubt.

9. Whether a speedy trial was improperly denied.

(b) LIST OF PARTIES

Kenneth A. Kozel, Petitioner

United States of America, Respondent

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(d) REFERENCE TO OPINION

United States of America v.
Kenneth A. Kozel,
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(e) JURISDICTION OF THIS COURT

(i) The judgment sought to be reviewed is dated and was entered July 26, 1990.

(ii) An order denying a petition for rehearing is dated and was entered September 11, 1990. The time to file a Petition for writ of certiorari was extended to and including December 20, 1990, by Justice Stevens (A-415).

(iii) Jurisdiction to review the judgment of the United States Court of Appeals for the Seventh Circuit is conferred by 28 U.S.C. 1254.

(f) CONSTITUTIONAL PROVISIONS, STATUTES, AND LOCAL RULES

Article III, Section II,
U.S. Constitution

The trial of all Crimes, except in cases of impeachment, shall be by jury...

18 U.S.C. 1(3) (REPEALED)

Any misdemeanor, the penalty for which, as set forth in the provision defining the offense, does not exceed imprisonment for a period of six months or a fine of not more than $5,000 for an individual and $10,000 for a person other than an individual, or both is a petty offense. (REPEALED)

18 U.S.C. 19

As used in this title, the term "petty offense" means a Class B misdemeanor, a Class C misdemeanor, or an infraction, for the maximum fine is no greater than the amount set forth for such an offense in section 3571 (b)(6) or (7) in the case of an individual or section 3571(6) or (7) in the case of an organization.

Illinois Supreme Court Rule 761

Conviction of a Crime.

(a) Notification. It is the duty of an attorney admitted in this State who is convicted in any court of a felony or misdemeanor to notify the Administrator of the conviction in writing within 30 days of the entry of judgment of conviction...

(f) Proof of Conviction. In any hearing conducted pursuant to this rule, proof of conviction is conclusive of the attorney's guilt of the crime.

Central District of Illinois

Local Rule 1(e):

Any person who, before his admission to the bar of this court

or during his suspension or disbarment therefrom, exercises in this district any of the privileges of a member of said bar in any action or proceeding pending in this court, or who pretends to be able to do so, may be adjudged guilty of contempt of court.

Northern District of Illinois
Local Rule 3.10A:

Who may appear. Except as otherwise provided in General Rules 3.11 and 3.112 and as otherwise provided in this Rule, only members in good standing of the bar of this Court may enter appearance of parties, file pleadings, motions or other documents, sign stipulations or receive payments upon judgements for decrees or orders.

Southern District of Illinois
Local Rule 1(d):

(d.) Representation in cases. In all cases filed in, or removed to, or transferred to this Court, all parties, except government agencies or those appearing pro se must be represented of record by a member of the bar of this Court.

Northern District of Indiana
Local Rule 1(c):

No person shall be permitted to practice generally in this court or before any officer thereof as an attorney, except in his own behalf when a party unless he has been admitted to practice by this court; provided however, that an Attorney admitted to practice in any other United States Court or the highest court of any state may, on applica-

tion, to this court be granted leave to appear in any specific action.

Southern District of Indiana
Local Rule 1(d):
In all cases filed in, removed to, or transferred to this court, all parties, except government agencies, or those appearing pro se, must be represented of record by a member of the bar of this court.

Eastern District of Wisconsin
Local Rule 2.01:
Manner of Appearance. All parties to actions filed in or removed to this court must appear either pro se or by an attorney admitted to practice in this court.

Western District of Wisconsin
Has no local rule requiring that an attorney be admitted to the bar before appearing in court on behalf of a party.

(g) STATEMENT OF THE CASE

On July 20, 1987, John Betts filed a civil rights action pro se in the Danville Division of the United States District Court for the Central District of Illinois, claiming that the City of Paxton, Illinois, members of its police department and others unjustly restrained him and caused him to fear for his safety and that of his wife and children. Betts was unable to appear for a

motion hearing in the case on May 12, 1988, in Danville because he had to appear at a sentencing hearing that same day in Ottawa, Illinois, in the case of People of the State of Illinois v. Roger Sampson, No. 87-CF-265. Sampson was awaiting sentencing on a guilty finding of aggravated criminal sexual assault for which he subsequently was sentenced to 45 years in the Illinois Department of Corrections.

The petitioner herein, Kenneth A. Kozel, also an attorney, appeared on Betts' behalf a the hearing in Danville on May 12, 1988, on various motions to dismiss. The presiding judge, Judge Baker, dismissed Betts' civil rights complaint but allowed Betts an opportunity to file an amended complaint. Before th time expired for Betts to replead, a settlement was reached between Betts and the City of Paxton, Illinois and was entered by the court. Five months after the case had been dismissed and no further action taken by any of the parties. Attorney Lanto, an attorney

for defendants in the case other than the City of Paxton, filed a motion alleging that the petitioner, Kenneth A. Kozel, was not admitted to the bar of the United States District Court for the Central District of Illinois.

On the way to a subsequent hearing in the civil rights case on January 20, 1989, Kozel was delayed about one hour due to construction of a new interstate highway, I-39, just north of existing Interstate 55. Shortly before 2:00 p.m. Kozel telephoned Judge Baker's chambers to inform the court he would be late for the 2:00 p.m. hearing. The person who answered the telephone said to not worry because Judge Baker was still hearing a matter that had begun that morning, U.S. v. Whitely 88-20046. Attorney Lanto, who testified for the government at Kozel's bench trial confirmed that Judge Baker went beyond 2 p.m. and called the Betts case at 2:40 p.m. Kozel appeared at about 2:50 p.m., but by this time Judge Baker had already entered

orders in the case in favor of Attorney Lanto and had left the bench. Attorney Lanto admitted at Kozel's trial that Lanto knew Judge Baker before Baker became a federal judge and that Attorney Lanto had appeared before Judge Baker some 75 to 100 times.

After arriving at the courthouse in Danville on January 20, 1989, Kozel attempted to file a motion to dismiss but the clerk refused to allow the filing. Instead the clerk informed Kozel he should go to Judge Baker's courtroom to file his papers. Kozel went to the courtroom, took a seat in the spectator section and waited his turn. The courtroom was unusually crowded with news media and other people who were interested in another case. Judge Baker then came back on the bench and recalled the Betts case. Kozel stated to the judge he had a motion to dismiss that he would like to file. Kozel heard Judge Baker remark in a matter of fact tone that Kozel was late and that he could file anything he wanted. Judge Baker then called

the next case.

The entire text of Judge Baker's comments as reported by the court reporter were allegedly as follows:

> THE COURT: You file whatever you want, Mr. Kozel. We are late. I have entered orders. I have ruled you to show cause why you shouldn't be held in contempt, and you are to appear on that rule February 9th at 1:30.

Kozel was unable to hear all of Judge Baker's remarks because he was so far away from the bench as a result of the presence of other attorneys at the counsel tables. The court did not pick up all of Kozel's statements as appears from her transcript.

Judge Baker did not prepare an order to show cause until three days later. Judge Mihm of the Peoria Division of the United States District Court for the Central District vacated that order at a later date. Kozel never was served with a rule to show cause. Kozel was never informed of what the nature of any alleged rule might have been. Judge Baker did not testify at the trial so there is nothing in the record as to what the above

comments exactly meant.

The docket sheet entry for January 20, 1989, in the civil rights case provided that the clerk was to serve Kozel by certified mail with a rule to show cause why Kozel should not be held in contempt of court for appearing before Judge Baker without being admitted to the bar of the Central District. A minute order entered three days later on January 23, 1989, incorporated the rule to show cause. The docket sheet further indicates that the rule was sent by certified mail but was never received by Kozel. The file fails to contain a signed receipt for certified mail. The certified mail was subsequently returned to the Clerk's office undelivered.

On February 9, 1989, the return day for the rule to show cause, the United States Attorney and Attorney Lanto were present before Judge Baker in Danville. Kozel was not present. Judge Baker disqualified himself because he was the complaining witness against

Kozel and the matter was then assigned to Judge Mihm in Peoria for further hearing.

On February 22, 1989, the United States Attorney filed an information and petition for Criminal Contempt Order against Kozel alleging (1) that Kozel appeared before Judge Baker on May 12, 1988 and January 20, 1989, without having been admitted to the Bar of the Central District in violation of Local Rule 1(e); (2) appeared 40 minutes late on January 20, 1989; and (3) failed to appear before Judge Baker on February 9, 1989, in respect of the rule to show cause. On July 11, 1989, Judge Mihm vacated the minute order entered by Judge Baker on January 23, 1989, which had incorporated the rule to show cause and ordered Kozel to appear on February 9, 1989.

Kozel demanded a trial by jury but the demand was denied since the government had elected to be bound by sentences not to exceed 6 months on each of the three charges. The government subsequently dropped the

charge that Kozel was not admitted to the bar of the Central District on January 20, 1989. A second search of the clerk's records on March 10, 1989, disclosed Kozel's readmission on January 19, 1989 (See Appendix, page 28)

Kozel was subsequently tried by bench trial. He testified that he had been admitted to the bar of the Central District and that the Clerk;s Office had misplaced his oath card and that there was no security in the keeping of the records. He further testified that he re-applied for admission, on the advice of his attorney and the clerk's staff, in the event that he might have to return to Danville on Bett's behalf in the civil rights case. An initial search of the clerk's records on February 15, 1989 failed to reveal that Kozel had been readmitted on January 19, 1989. (See Appendix, page 27).

Kozel was acquitted of the charge of appearing 40 minutes late but was found guilty of criminal contempt of court for appearing in court on May 12, 1988, without

being admitted to the Bar of the Central District. He was also found guilty of criminal contempt of court for not appearing before Judge Baker on February 9, 1989, when Judge Baker disqualified himself from the case.

Kozel was sentenced to pay $600.00 and perform 5 criminal cases pro bono.

The United States District Court for the Central District had jurisdiction to hear the case pursuant to Title 18 of the United States Code.

The Seventh Circuit Court of Appeals had jurisdiction to review the decision of the United States District Court pursuant to 28 U.S.C. 1291.

ARGUMENT

(1) An attorney who faced 18 18 months in jail as a result of a conviction for criminal contempt of court was entitled to a trial by jury pursuant to 18 U.S.C. 19 and the repeal of 18 U.S.C. 1(3).

The government sought a possible jail sentence of not less than 6 months for each of the three charges against Kozel. The government relied on prior case law which in

turn relied on 18 U.S.C. 1(3) which was subsequently repealed (Pub. L. 984; 473 Title II, sec. 218(a)(1), October 12, 1984, 98 Stat. 2027).

Prior to its repeal, 18 U.S.C. 1(3) provided:

> Any misdemeanor, the penalty for which, as set forth in the provision defining the offense, does not exceed imprisonment for a period of six months or a fine of not more than $5,000.00 for an individual and $10,000.00 for a person other than an individual, or both is a petty offense.

Following the repeal of 18 U.S.C. 1(3), the newly enacted 18 U.S.C. 19, effective November 1987, provides:

> As used in this title, the term "petty offense" means a Class B misdemeanor, a Class C misdemeanor, or an infraction, for which the maximum fine is no greater than the amount set forth for such an offense in section 3571(b)(6) or (7) in the case of an individual or section 3571(6) or (7) in the case of an organization.

18 U.S.C. 3571(b)(6) and (7) disclose that the only sentence imposed is a fine which cannot exceed $5,000.00. No provision

is made for jail time.

The government and the Seventh Circuit Court of Appeals relied on a long line of cases which relied on 18 U.S.C. 1(3) and which have been effectively abrogated by the repeal of 18 U.S.C. 1(3). Duncan v. Louisiana, 391 U.S. 145 (1968); District of Columbia v. Clawans, 300 U.S. 617 (1937); Callan v. Wilson, 127 U.S. 540 (1888); Muniz v. Hoffman, 422 U.S. 454 (1975); Taylor v. Hayes, 418 U.S. 488 (1974); Frank v. United States, 395 U.S. 147 (1969); Bloom v. Illinois, 391 U.S. 194 (1968); Cheff v. Schnackenberg, 384 U.S. 373 (1966); U.S. v. Rylander, 714 F. 2d 996 (1983); Marrese v. Am. Academy of Ortho. Surgeons, 726 F. 2d 1150 (7th Cir. 1984); Blanton v. City of North Las Vegas, 109 S. Ct. 1289 (1989).

18 U.S.C. 19 abolishes prison sentences for petty offenses. Since Kozel faced a jail term of 18 months for the three charges, the charges were not petty offenses as the government and the court had maintained. On the

contrary, the three charges were "serious" offenses, that is, offenses for which prison terms might be imposed. Therefore, Kozel was improperly denied his right to a trial by jury.

In its opinion, the Seventh Circuit Court of Appeals states that the purpose of newly enacted 18 U.S.C. 19 is to limit the possible jail time for petty offenses to six months in jail and to put a cap on the maximum fine at $5,000 (Op., page 4). The court supplies no reasoning for this rationale and instead cites cases interpreting 18 U.S.C. 1(3) which has been repealed.

If the only purpose of 18 U.S.C. 19 was to limit the time that a defendant could be incarcerated to six months and put a cap of $5,000.00 on the fine that could be imposed, then there would not have been any need for enactment of 18 U.S.C. 19 in the first place. The prior section, 18 U.S.C. 1(3) provided for these same penalties.

If one looks at the cases that have been

appealed involving criminal contempt, it becomes clear that much of the litigation involves the question of whether or not a jury should have been provided the defendant. Congress finally did the rational thing and enacted legislation that resolved this question. Congress enacted 18 U.S.C. 19 which says that a petty offense is one that provides for a fine only and does not have jail in the picture. If a defendant is not subject to jail, then he is not entitled to trial by jury. Actually this is one of the more reasonable things that Congress has done in the way of corrective legislation. Removing the issue of entitlement to a jury trial by removing the possibility of a jail sentence makes good sense. In fact, the action of the Congress will decrease the number of appeals when defendants find they are only faced with a fine rather than incarceration.

The reasoning expressed in the opinion of the Seventh Circuit Court of appeals confuses the definition of a petty offense. The

Court concludes that since 18 U.S.C. 19 refers to Class B and C misdemeanors and 18 U.S.C. 3581 authorizes a jail sentence for a misdemeanor, then jail sentences can also be imposed for petty offenses. Nothing could be more incorrect. A petty offense is a particular type of Class B or C misdemeanor or infraction for which a jail sentence cannot be imposed.

When Kozel faced 18 months in jail, the alleged "petty offenses" were actually "serious" offenses which required that he be afforded his Sixth Amendment right to a trial by jury.

This is a case of first impression in which the result is directly contrary to the plain meaning of a recent Congressional enactment and will affect all future prosecutions of alleged "petty offenses" carrying a possible jail sentence. The Seventh Circuit Court of Appeals has sanctioned such a departure by the lower court from the accepted and usual course of judicial proceedings as to

call for an exercise of this Court's power of supervision.

> (2) A sentence of $600.00 plus the performance of 5 criminal cases pro bono as a result of a conviction for criminal contempt of court exceeded the maximum sentence of a $5,000.00 fine authorized by 18 U.S.C. 19 and thereby violated an attorney's right to a trial by jury.

Kozel was sentenced to pay $600.00 and perform five criminal cases pro bono. The value of an attorney's performance of five criminal cases added to the $600.00 exceeds the sum of $5,000.00, the maximum fine pursuant to 18 U.S.C. 19 and 18 U.S.C. 3571(b)(6) and (7). Since the penalty imposed exceeded that allowed for a petty offense, the charges against Kozel were "serious" and he should have been allowed a trial by jury. The trial court had no right to surreptitiously impose a sentence of "community service" as a means of increasing the amount of the fine beyond the maximum allowed by law.

Sentencing someone to perform services related to his profession is not community service. Community service is contributing a

certain number of off work hours to the public good, hours which are unrelated to one's profession. There is a big difference between sentencing one to contribute time that one use to make a living as opposed to contributing what has been referred to as free time. Sentencing one to contribute the time one uses to support himself or his family is a defacto fine, or in other words, a fine in kind. The Seventh Circuit's opinion states that Codispoti v. Pennsylvania, 418 U.S. 506 (1974) is "arguably relevant". Codispoti is not relevant for two reasons. First, Codispoti is is interpreting 18 U.S.C. 1(3) which has been repealed. Second, as Justice Marshall notes in his concurring opinion, the contempt in the case took place in open court before the judge. As a result, there were no facts to be determined by a jury. For that reason, the right to a jury trial was denied. None of the factual allegations in Kozel's case involved actions occurring in the courtroom. Therefore, the facts in Kozel's case should have been

determined by a jury.

> (3) An attorney who received a permanent blot on his license to practice law and loss of his professional reputation as a result of a conviction for criminal contempt of court, was entitled to a trial by jury.

At the sentencing hearing in this case, the trial judge stated:

> Now we have to note too that Mr. Kozel, you now have two Class B misdemeanors. That is a punishment to an attorney to have those federal misdemeanors on his record. In the normal course of events I doubt if that would amount to a role of pins. But should anything take place in the future that calls question to your conduct or to your abilities, perhaps this will have an effect, I don't know. But as lawyers I think that we would all acknowledge that this is a punishment to have them.

In addition to the above, Illinois Supreme Court Rule 761 (Conviction of a Crime) provides:

> (a) Notification. It is the duty of an attorney admitted in this State who is convicted in any court of a felony or misdemeanor to notify the Administrator of the conviction in writing within 30 days of the entry of judgment of conviction...
>
> (f) Proof of Conviction. In any hear-

> ing conducted pursuant to this rule, proof of conviction is conclusive of the attorney's guilt of the crime.

Before sentencing and the entry of judgment by the trial court, the Assistant U.S. Attorney initiated a complaint about Kozel with the Attorney Registration and Disciplinary Commission. (Appendix, page 25).

The distinction between a petty offense and a serious offense lies in the objective indications of the seriousness with which society regards the offense. Blanton v. City of North Las Vegas, 489 U.S. 538 (1989). In this case we have the trial judge stating that it is a punishment to an attorney to have federal misdemeanor convictions on his record. Furthermore, the Illinois Supreme Court has stated through its disciplinary Rule 761 that Kozel is conclusively guilty of a crime simply as a result of being convicted. Kozel has had a complaint filed against him by the Assistant U.S. Attorney who prosecuted him (Appendix, page 25).

In the recent case of Richtor v.Fairbanks, 903 F. 2d 1202 (8th Cir. 1990), the Eighth Circuit took an approach opposite to the Seventh Circuit Court of Appeals and held that a defendant facing revocation of his driver's license was entitled to a jury trial. See also the opinion of the Ninth Circuit in U.S. v. Craner, 652 F. 2d 23 (9th Cir. 1981); Brady v. Blair, 427 F. Supp. 5 (1976) and U.S. v. Wood, 450 F. Supp. 1335 (1978) all in agreement the Eighth Circuit and contrary to the Seventh Circuit.

Kozel has been and will be seriously affected in his professional life as an attorney as a result of his criminal convictions. If a potential loss of driving privileges merits a jury trial, then surely so does potential loss of the right to practice law and other adverse professional consequences.

The opinion of the Seventh Circuit Court of Appeals states that there is no right to a jury trial just because disciplinary proceedings flow from a conviction - "otherwise

every successful criminal contempt charge filed against a lawyer in Illinois would require a jury on demand. No authority or statistics on the number of attorneys facing criminal contempt are provided to justify the court's conclusion.

The Seventh Circuit relies heavily on Muniz v. Hoffman, 422 U.S. 454 (1975). But it has been held that Muniz does not apply in a criminal contempt action against an individual. (See U.S. v. McAllister, 630 F. 2d 772 (10th Cir. 1980).

(4) A local rule of a United States District Court, which is not a definite or specific, cannot be the basis of a conviction for criminal contempt.

Kozel was convicted of criminal contempt of court for appearing in court in the United States District Court for the Central District on behalf of a party allegedly without being admitted pursuant to Local Rule 1(e) which provides:

> Any person who, before his admission to the bar of this court or during his suspension

> or disbarment therefrom, exercises in this district any of any of the privileges of a member of said bar in any action or proceeding pending in this court, or who pretends to be able to do so, may be adjudged guilty of contempt of court.

Nowhere in Local Rule 1(e) is the word "privileges" defined. Nowhere in Local Rule 1(e) does it say that one will be held in criminal as opposed to civil contempt of court for appearing in court on behalf of a client.

In an earlier opinion, the trial judge admitted that Local Rule 1(e) is ambiguous:

> ...This question has not arisen before--no case before this Court has ever before concerned this apparent ambiguity in our rules. (See Appendix, page 23).

The local rules of all of the various United States District Courts within the jurisdiction of the Seventh Circuit Court of Appeals have been set forth above with the exception of the Western District of Wisconsin, which has no local rule on the admission of attorneys to the bar of the court.

All other District Courts have a rule which definitely and specifically states that an attorney must be a member of the bar of that particular District Court before appearing in court on behalf of a party. In spite of the above rules, it appears that the Chief Judge of the Northern District in Chicago disapproves of criminal prosecutions for appearing in court on behalf of a party without being admitted to the bar of the Northern District. (See Appendix, pages 29-31). In any event, the Central District of Illinois had no rule similar to the other districts which definitely and specifically stated that an attorney must be admitted to the bar of the District Court before appearing in court on behalf of a party.

After Kozel's case was concluded in the trial court, the Central District enacted a standing order of the court, Standing Order 35, that states an attorney must be a member of the Central District Bar before appearing on behalf of a criminal defendant. No doubt

a similar rule applicable to civil cases will not be enacted until this appeal has been decided and the mandate returned to the Central District Court. If Local Rule 1(e) said what the trial court thought it said, what reason would there be to enact Standing Order 35? The fact is that Local Rule 1(e) fails to specifically and definitely require an attorney to be a member of the Central District Bar before representing a party in court.

Without the existence of an order containing terms which are clear and specific and which leave no doubt or uncertainty in the minds of those to whom it is addressed, Kozel cannot be found to be in criminal contempt in the Central District. United States v. Joyce, 498 F. 2d 592, 596 (7th Circuit, 1974).

While one might speculate that appearing in court on behalf of clients might be a privilege of membership in the Central District Bar, such speculation will not support a prosecution for criminal contempt. What the underlying courts did in this case was

supply an order where no order exists that says that an attorney must be a member of the Bar before appearing on behalf of clients.

The Seventh Circuit relied on Maynard v. Cartwright, 486 U.S. 356 (1988) and no other authority to support its comment that a reasonable person would have known that appearing in court without having joined the bar was conduct covered and prohibited by Local Rule 1(e). But this is not what Maynard v. Cartwright says. Maynard v. Cartwright's one-sentence discussion of the due process approach to vagueness was dicta in that case. Maynard v. Cartwright directed its attention not to the due process clause but to analyzing claims of vagueness directed at aggravating circumstances defined in capital punishment statutes from the standpoint of the Eighth Amendment.

Contrary to the Seventh Circuit's opinion, there was no way for any person to know that appearing in court on behalf of a party in the Central District, without being

admitted to the Bar, constituted criminal contempt of court punishable by fine or imprisonment.

On page 6 of its opinion, the Seventh Circuit cites the case of U.S. v. Twentieth Century Fox Film Corp., 882 F. 2d 565, 659 (2d Cir. 1989) for the proposition that "sanctions for criminal contempt depend on proof of a willful violation of a lawful, definite and specific court order. The case of U.S. v. Joyce, 498 F. 2d 592, 596 (7th Circ. 1974) stands for the same proposition, i.e., that a person cannot be found guilty of criminal contempt of court unless the order allegedly violated is clear and specific and its terms leave no doubt or uncertainty.

The Seventh Circuit then proceeded to digress from the above correct statement of the law. On page 6 the court states:

> ...if any "privilege" is sensibly reserved to members of the bar, then appearing on behalf of a party in a pending proceeding clearly is, and Local Rule 1(E) establishes at least that much...

This is where the Seventh Circuit blurs the requirement of the law that criminal contempt can result only from the violation of a definite and specific order. Local Rule 1(e) absolutely does not "establish that appearing on behalf of a party in a pending proceeding is a privilege reserved to members of the bar." Rule 1(e) does not say anything at all like this. Nowhere does Local Rule 1(e) even define the word "privilege". If one has to guess what privileges there are, he certainly cannot be held in criminal contempt. U.S. v. Joyce says that the order itself must be definite and specific in order to charge criminal contempt. When we start to read into the rule and say things like "a reasonable person would have known", then we are clearly outside the parameters of criminal contempt. Local Rule 1(e) simply fails to say the specific and definite magic words that a person will in fact be charged with criminal contempt of court if he appears in court on behalf of a party without being admitted to the bar.

Who is it that determined that criminal contempt rather than civil could be charged under Local Rule 1(e). Local Rule 1(e) is silent as to whether civil or criminal contempt is at issue.

The Seventh Circuit states on page 6 that "Kozel had notice when he entered his appearance and the district court distinctly asked whether or not he was a member of the bar." The district court supplied no more notice than Local Rule 1(e). Nowhere in the transcript does the district court tell Kozel that he would be held in criminal contempt of court if he appeared in court on behalf of a party before having been admitted to the Central District Bar. Neither Local Rule 1(e) nor the question posed to Kozel by the district court satisfied the requirement that a definite and specific court order precede a finding of criminal contempt.

(5) A defendant cannot be found guilty of criminal contempt for failing to appear at a hearing on a rule to show cause at which the presiding judge disqualifies himself.

Kozel was found guilty of failing to appear on February 9, 1989, (as directed on January 20, 1989) to show cause why he should not be held in contempt. The government introduced over objection a minute order entered January 23, 1989 by Judge Baker which ordered that Kozel appear on February 9, 1989 to show cause why he should not be held in contempt. The above minute order dated January 23, 1989, was mailed to Kozel by certified mail but was never received and was returned to the clerk of the court. The above minute order dated January 23, 1989, was vacated by Judge Mihm after Judge Mihm found that Kozel had been denied due process of law (Appendix, page 26).

On February 9, 1989, in Danville, Judge Baker disqualified himself and assigned the case to Judge Mihm in Peoria. Nevertheless, Kozel was convicted of criminal contempt of court for not being present in court that day in Danville. Since Kozel's conduct in not being present on February 9, 1989, in Danville

did not delay the administration of justice, his conviction for criminal contempt of court cannot stand. In re Williams, 509 F. 2d 949 (1975); U.S. v. Peterson, 456 F. 2d 1135 (1972).

(6) A criminal prosecution using witness transcripts rather than live witnesses violates one's right to confront witnesses.

The government used a writing by the Clerk of the Court and a transcript of certain remarks of Judge Baker to sustain its prosecution. Neither the Clerk nor Judge Baker was called as a witness in the case. Judge Baker was the complaining witness. The defendant had the right to confront and cross-examine both Judge Baker and Clerk of the court pursuant to the Sixth Amendment of the United States Constitution. Coy v. Iowa, 108 S. Ct. 2798; U.S. v. Inadi, 475 U.S. 387 (1986); California v. Green, 399 U.S. 149 (1970); Dutton v. Evans, 400 U.S. 74 (1970); Ohio v. Roberts, 448 U.S. 56 (1980); Lee v. Williams, 90 L.Ed. 2d 514 (1986).

If the positions of the lower courts are adopted by this court, it would never be necessary to have witnesses testify for the government. The government could simply introduce grand jury transcripts and never present any witnesses in its case in chief. The burden of proof is on the government to prove a defendant guilty beyond a reasonable doubt. In Re Stewart, 571 F. 2d 958 (1978); Falstaff Brewing Corp. v. Miller Brewing Co., 702 F. 2d 720 (1983). A defendant, such as Kozel, does not have to prove himself innocent.

(7) The refusal of the trial judge to allow a defendant to call a government employee sitting in the courtroom as a witness violated the right to confront witnesses and to due process of law.

At trial, Kozel's attorney attempted to call Mary Ann Benya, Chief Deputy Clerk of the Springfield Office, as a witness when he saw her sitting in the courtroom. The purpose was to examine her in respect of the sloppy manner in which attorney admission

records are kept by the Clerk's office. The trial judge refused to allow Mrs. Benya to be called as a witness by Kozel for the reason that Kozel's attorney had not given Mrs.Benya a subpoena and had not listed Mrs. Benya on a witness list. There is no requirement in the Federal Rules of Criminal Procedure or the Local Central District Rules that there be an exchange of a witness list. Kozel's right to confront the witnesses against him and his right to due process of law were violated.

(8) A criminal contempt conviction requires findings of willfulness and guilt beyond a reasonable doubt.

Nowhere in the record does the trial judge specifically find Kozel guilty beyond a reasonable doubt or find that his conduct was willful. Kozel had an absolute right to be found guilty beyond a reasonable doubt. In re Stewart, 571 F. 2nd 958 (CA, Miss, 1978); Falstaff Brewing Corp. v. Miller Brewing Co., 702 F. 2d 720 (CA, Cal, 1983); U.S. v.

Professional air Traffic Controllers, 678 F. 2d 1 (1st. Cir. 1982); In Re Winship, 397 U.S. 358 (1970); Bloom v. Illinois, 391 U.S. 194 (1968).

In addition the trial judge also stated "...Kozel might have thought he was (admitted) but Mr. Kozel apparently was not". There must be a willful violation of a definite and specific order in regard to criminal contempt. Such an expression only reinforces the failure of the trial judge to make a finding that Kozel's alleged actions were willful. U.S. v. Joyce, 498 F. 2d 592 (7th Cir. 1974); U.S. v. Twentieth Century Fox Film Corp., 882 F. 2d 565 (2d Cir. 1989)

Thus, there is neither a finding of guilt beyond a reasonable doubt nor a finding of a willful violation of a definite and specific order. The Seventh Circuit improperly attempts to whitewash this by saying that absent a clear sign that some other standard of proof was used, it would not infer that such a basic norm of our legal system was contravened or

ignored. (Op., page 7).

Kozel's trial took place in September of 1989. In January of 1990, the trial judge in Kozel's case presided over a trial also involving allegations of criminal contempt. In Re Betts, 730 F. Supp. 942 (C.D. Ill. 1990). In an opinion and order entered on January 25, 1990, the trial judge stated in part:

> ...Evidence was submitted by the government which showed, beyond a reasonable doubt, that the court had entered an order of reasonable specificity which required Respondent's presence at the hearing on June 19, and that Respondent wilfully (sic) violated that order. See United States v. Burstyn, 878 F 2d 1322, 1324 (11th Cir. 1989). Thereafter it became incumbent upon the Respondent to satisfy the Court that his failure to comply with our order was in fact not wilful (sic), but was rather subject to some reasonable excuse. See United States v. Ferm (In re Gant, 547 F. Supp. 33, 34 (N.D. Ill. 1982). Respondent utterly failed to so satisfy the court...

Only some five months after Kozel's trial for criminal contempt the trial judge used a standard of proof in a criminal contempt case which is identical to that used in civil contempt cases. While the trial judge used the

"buzz words", reasonable doubt in the subsequent case what he in reality was saying was something totally different. The trial judge's assertion that all that has to be proven is that an order existed and that it was violated, is a standard applied to civil matters, not criminal. The defendant in a criminal matter does not have to prove anything to the court, never has, and never will. The burden of proof is totally on the United States and proof shifting does not apply to criminal cases. (In Re Winship, 397 U.S. 358 (1970); Bloom v. Illinois, 391 U.S. 194 (1968); U.S. v. Professional Air Traffic Controllers, 678 F. 2d 1 (1982).

The two cases relied upon by the trial judge (Burstyn and Gant) are not dispositive of the issues regarding the burden of proof. Gant says that the burden is on the attorney to explain why he did not come to court. But, Gant is merely the reporting of an action in a Federal District Court which apparently was never appealed so as to give the benefit of

review by the Court of Appeals.

It is obvious that if the trial judge in Kozel's case did not apply a reasonable doubt standard in the Betts case five months after the Kozel case, he most certainly did not apply the reasonable doubt standard to Kozel's case.

(9) The right to a speedy trial was improperly denied.

Kozel's attorney moved to dismiss the charges in the trial court for the reason that Kozel was denied a speedy trial. The Seventh Circuit held that there was no right to a speedy trial because of the classification of the alleged offenses as petty offenses. (Op., page 7)

The offenses charged were serious offenses in light of 18 U.S.C. 19 since they carried jail terms and had an adverse impact on Kozel's license to practice law. Therefore, Kozel was entitled to a speedy trial and its denial was reversible error.

WHEREFORE, the petitioner, KENNETH A.

KOZEL, prays that this court grant this petition for writ of certiorari and reverse the decision of the Court of Appeals.

KENNETH A. KOZEL, PETITIONER

BY _____
KENNETH A. KOZEL PRO SE

APPENDIX

APPENDIX (continued)

In the

United States Court of Appeals

For the Seventh Circuit

No. 89-3161

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

KENNETH A. KOZEL,

Defendant-Appellant.

Appeal from the United States District Court
for the Central District of Illinois, Springfield Division.
No. 89-20015—**Richard Mills**, *Judge*.

ARGUED MAY 9, 1990—DECIDED JULY 26, 1990

Before POSNER and FLAUM, *Circuit Judges*, and WILL, *Senior District Judge*.*

WILL, *Senior District Judge*. Article III, § 2, provides that "The Trial of all Crimes, except in Cases of Impeachment; shall be by Jury," and the Sixth Amendment guarantees a jury trial "in all criminal prosecutions." But "petty" crimes or offenses are not subject to the jury trial clauses, *Duncan v. Louisiana*, 391 U.S. 145, 159 (1968); *District of Columbia v. Clawans*, 300 U.S. 617, 624 (1937);

* The Honorable Hubert L. Will of the United States District Court for the Northern District of Illinois, Eastern Division, is sitting by designation.

Callan v. Wilson, 127 U.S. 540, 557 (1888), and criminal contempt can be a petty offense. *Muniz v. Hoffman*, 422 U.S. 454, 475-76 (1975); *Taylor v. Hayes*, 418 U.S. 488, 495 (1974); *Frank v. United States*, 395 U.S. 147, 148 (1969); *Bloom v. Illinois*, 391 U.S. 194, 198 (1968); *Cheff v. Schnackenberg*, 384 U.S. 373, 379-80 (1966).

Kenneth Kozel was charged under 18 U.S.C. § 401(3) (1988) with three instances of criminal contempt: appearing in federal court in Danville on May 12, 1988 without having been admitted to practice in the Central District of Illinois, a violation of Local Rule 1(E); appearing in federal court in Danville on January 20, 1989, forty minutes late; and failing to appear on February 9, 1989, after having been ordered to appear to show cause why he should not be held in contempt of court.

The government, hoping that it could avoid a jury trial by tracking the definition of "petty offense" contained in 18 U.S.C. §§ 19, 3559 (a)(7) and 3571 (b)(6,7) (1988)—and apparently without considering the arguable relevance of *Codispoti v. Pennsylvania*, 418 U.S. 506 (1974)—offered to "be bound by a maximum penalty of six months imprisonment and a $5,000 fine for *each* instance of contempt which is proved." Government's Memorandum of Law on Criminal Contempt Proceedings, Plaintiff-Appellee's Appendix 5 (emphasis added).[1] On the basis of that offer, and with the court's concurrence, Kozel's acts of contempt were treated as "petty" and tried to the bench. The court found Kozel guilty of two instances of contempt (violation of Local Rule 1(E) and failure to appear) but acquitted him of the third (tardiness), fined him $600 and ordered him to request and accept appointment, pro bono,

[1] See *Codispoti*, 418 U.S. at 517 (1974) (rejecting Pennsylvania's argument that multiple instances of contempt, arising "from a single trial, . . . charged by a single judge, and . . . tried in a single proceeding," were nonetheless "separate offenses and that, because no more than a six months' sentence was imposed for any single offense, each contempt was necessarily a petty offense triable without a jury").

in five criminal cases over the next two years. Kozel has not attacked the sentence as unauthorized or an abuse of discretion. He argues that he was wrongfully denied a jury trial and that 18 U.S.C. § 19 creates an entitlement to one in any case of criminal contempt where a prison sentence might be imposed. The government argues that no jury was called for and that § 19 is the basis for denying one. Both sides have botched it.

Section 19 is not grounds by itself for refusing a jury demand.[2] Congress cannot narrow the scope of the jury trial clauses by statutory enactment. The government has missed the mark. Congress could, however, effectively enlarge the scope of the jury clauses by legislative pronouncement, and Kozel imagines that it has done so. He has missed the mark too. Former 18 U.S.C. § 1(3) contained an express reference to imprisonment, see *supra* note 2, while the newer § 19 does not, and in that change Kozel purports to find a statutory entitlement, arguing that by its silence about prison time § 19 must be read to abolish prison sentences for "petty offenses," making any crime for which a prison term might be imposed a "serious" offense to be tried to a jury if the defendant demands it. But that is nonsense.

Nothing in § 19 creates a statutory entitlement to a jury trial, for criminal contempt or any other crime. There's no mention of juries in § 19 and no implication that a right to a jury trial should be read in. Compare 18 U.S.C. §§ 402, 3691, and 3692 (1988) and 42 U.S.C. §§ 1995 and 2000h (1982), which explicitly create entitlements to a jury

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[2] Title 18, U.S.C., § 19 provides that a "petty offense" is "a Class B misdemeanor, a Class C misdemeanor, or an infraction, for which the maximum fine is no greater than the amount set forth for such an offense in section 3571(b)(6) or (7) . . . ." Previously, "petty offense" was defined by 18 U.S.C. § 1(3) (repealed by Pub.L. 98-473, 98 Stat. 2027), which provided that a petty offense was "any misdemeanor, the penalty for which, as set forth in the provision defining the offense, does not exceed imprisonment for a period of six months or a fine of not more than $5,000 . . . ."

trial for various kinds of criminal contempt. The argument that § 19 abolishes prison sentences for "petty offenses" also fails. Section 19 does no such thing. It expressly refers to Class B and C misdemeanors, and 18 U.S.C.A. § 3581 (Supp. 1989) authorizes prison sentences not only for misdemeanors but even for infractions. The purpose of § 19 is simply to limit prison time for crimes covered by that section to six months, see 18 U.S.C. § 3559(7), without forbidding it, and to put a cap of $5,000 on the fines that can be imposed. See 18 U.S.C. § 3571 (b)(7). Section 19 neither expands nor limits a defendant's statutory right to a jury trial for criminal contempt and may inform but does not control interpretation of the jury clauses in Article III and the Sixth Amendment.

That leaves the jury clauses themselves. As indicated, Kozel did not have a statutory right to a jury trial. But did he have a constitutional right to one? Again, the answer is no. The relevance of the jury clauses in a trial for criminal contempt turns on the severity of the sentence actually imposed. *Bloom*, 391 U.S. at 211. See also *Codispoti*, 418 U.S. at 511; *Taylor*, 418 U.S. at 495; *Frank*, 395 U.S. at 149-150. And in the absence of a legislative declaration to the contrary, a sentence of six months or less (plus normal periods of probation, *Frank*, 395 U.S. at 150-51) may be imposed without an opportunity for a trial by a jury. *Cheff*, 384 U.S. at 380. See also *Muniz*, 422 U.S. at 476; *Codispoti*, 418 U.S. at 511-12; *Taylor*, 418 U.S. at 496; *Baldwin v. New York*, 399 U.S. 66, 69 (1970). Strictly speaking, Kozel got no time. He was sentenced, however, to a fine and a dose of community service, raising an interesting question. When, if ever, do contempt sentences other than imprisonment require an opportunity for a jury trial? See *Muniz*, 422 U.S. at 475-76 (framing but not clearly answering that question).

Kozel has not argued that compliance with an order to take on five cases amounts to such a restraint on his liberty that a jury trial was required. Instead, he argues that the value of five cases, in time and labor, exceeds the $5,000 ceiling set by 18 U.S.C. §§ 19 and 3571 (b)(6,7) on

fines for petty offenses. As we have already seen, Congress' definition of a petty offense has no "talismanic significance." *Muniz*, 422 U.S. at 477.[3] More to the point, court-ordered community service is not a fine. The proper analogy would be to work release or probation, which are forms of punishment imposed because they serve purposes that fines do not. Kozel's sentence cannot and should not be translated into dollars and cents; and that he might be able to charge paying clients more than $5,000 for the work the district court has ordered him to do for free does not trigger constitutional concerns about his right to a jury trial. Neither does the fact that proceedings before the Illinois Attorney Registration and Disciplinary Commission may follow from his conviction—otherwise, every successful criminal contempt charge filed against a lawyer in Illinois would require a jury upon demand, since attorney convictions constitute grounds for possible inquiry by the A.R.D.C. and must be reported. Illinois Supreme Court Rule 761, Ill. Ann. Stat. ch. 110A, ¶ 761 (Smith-Hurd 1985).

Three more points need mention.

1. Sanctions for criminal contempt depend on proof of a willful violation of a lawful, definite and specific court order. *United States v. Twentieth Century Fox Film Corp.*, 882 F.2d 656, 659 (2d Cir. 1989), *cert. denied*, 110 S.Ct. 722 (1990). Paragraph 1 of the information and petition filed against Kozel charged that he "appeared before the United States District Court for the Central District of Illinois . . . without having been admitted to practice before that court," in violation of Local Rule 1(E) of the Central District. Local Rule 1(E) provides that:

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[3] See also *Girard v. Goins*, 575 F.2d 160 (8th Cir. 1978). But cf. *United States v. Professional Air Traffic Controllers Org.*, 678 F.2d 1 (1st Cir. 1982); *United States v. McAlister*, 630 F.2d 772 (10th Cir. 1980); *United States v. Hamdan*, 552 F.2d 276 (9th Cir. 1977); *Douglass v. First Nat'l Realty Corp.*, 543 F.2d 894 (D.C. Cir. 1976).

> [a]ny person who, before his or her admission to the bar of this Court . . . exercises in this District any of the privileges of a member of said bar in any action or proceeding pending in this Court, or who pretends to be entitled to do so, may be adjudged guilty of contempt of court.

Kozel contends that 1(E) does not definitely and specifically require what his conviction presupposes—that only members of the district bar can appear in court. We disagree. Although plainer statements can be found, compare Local Rule 3.10 for the Northern District of Illinois ("[O]nly members in good standing of the bar of this Court may enter appearance of parties . . . ."), if any "privilege" is sensibly reserved to members of the bar, then appearing on behalf of a party in a pending proceeding clearly is, and Local Rule 1(E) establishes at least that much. It is possible of course for a rule to be so unclear as to fail entirely to require or forbid anything. Hence the due process doctrine of vagueness. *Lanzetta v. New Jersey*, 306 U.S. 451 (1939). But Local Rule 1(E) is not on its face repugnant to due process, it is not so vague that it "proscribe[s] no comprehensible course of conduct at all," *United States v. Powell*, 423 U.S. 87, 92 (1975), and judged as applied here, *Maynard v. Cartwright*, 486 U.S. 356, 361 (1988), it is not a trap for the unwary. A reasonable person would have known that entering an appearance without having joined the district bar was conduct covered and forbidden by the rule. See *Cartwright*, 486 U.S. at 361. And Kozel had notice. When he entered his appearance, the district court distinctly asked whether or not he was a member of the district bar.

2. Criminal contempt—like other criminal charges—must be proved beyond a reasonable doubt. The district judge never stated on the record that the government's proof had met that standard. He made detailed findings but without mentioning, either in open court or on paper, reasonable doubt or any other standard of proof. Kozel concludes therefore that he was not found guilty beyond

a reasonable doubt. District judges and magistrates, however, are well aware of the rudimentary requirement that guilt must be proved beyond a reasonable doubt, and absent a clear sign that some other standard of proof has been used—and there is no such indication here—we will not infer that such a basic norm of our legal system was contravened or ignored. *United States v. Van Fossan*, 899 F.2d 636, 638 (7th Cir. 1990). Express statements of the applicable burdens and standards, made on the record, would obviously prevent issues like this from appearing on appeal.

3. Kozel presses five more arguments. One (speedy trial) is disposed of by 18 U.S.C. § 3172 (2) (1988). The others do not merit discussion.

The judgment of the district court is

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

UNITED STATES OF AMERICA, PLAINTIFF,	)	
v.	)	NO. 89-20015
KENNETH A. KOZEL, DEFENDANT.	)	

ORDER OF FINDINGS AND CONCLUSIONS

RICHARD MILLS, District Judge:

Defendant has been charged by information with criminal contempt of court, pursuant to 18 U.S.C. 401, for three instances of failure to abide by a lawful order of a court. This cause was tried before the Court on September 6, 1989. The Court has considered the testimony and exhibits admitted during the bench trial, as well as arguments made by counsel both during trial and in post-trial filings. The Court therefore enters the following findings and conclusions:

1. Defendant was charged with three instances of criminal contempt. First, Defendant was charged with appearing in Federal Court

in Danville, Illinois, on or about May 12,1988, without having first been admitted to practice in the Central District of Illinois, in violation of Local Rule 1(E). Second, Defendant was charged with appearing for a hearing in federal court in Danville, Illinois, on January 20,1989, forty minutes late. Third, Defendant was charged with failing to appear in federal court in Danville, Illinois, on February 9, 1989, at 1:30 p.m. to show cause why he should not be held in contempt of court, despite having been ordered to so appear by United States District Judge Harold A. Baker.

2. The elements necessary to be proven by the Government for conviction of all three counts, as stated by the Government and not objected to by Defendant, require the existence of a lawful order and the willful disobedience of that order. This, in turn, requires that the Defendant have knowledge of the order but refuse to comply with the order.

3. The Court finds, with respect to the first charged instance of contempt, that

Defendant did willfully fail to abide by that lawful order of court. The Court finds that Local Rule 1(E), Government Exhibit 6, constitutes a lawful order of court. Although Defendant has throughout these proceedings intimated that Local Rule 1(E) is ambiguous, the Court finds that Defendant has wholly failed to establish this; in fact, the Court finds Local Rule 1(E) to explicitly provide for the punishment by criminal contempt of those persons failing to be admitted to practice in this district prior to appearing before a court of the district. Further, the Court finds that Defendant knowingly and willfully entered an appearance and argued a motion before Chief Judge Harold A. Baker in United States District Court in Danville, Illinois, on May 12, 1988, in the matter of Betts v. Wilson, et al., No. 87-2375, without having first been admitted to practice in the Central District. The Court believes and credits Government Exhibit 5, a certificate of search indicating that no record exists of the Defendant being admitted to

practice in the Central District of Illinois. Conversely, we find unpersuasive Defendant's self-serving and unsupported testimony that he became admitted in the United States District Court for the Southern District of Illinois, in the Peoria Division, which later became a part of this District, in approximately 1976; this wholly unsubstantiated testimony is nothing but incredible. Hence, the Court finds Defendant guilty of criminal contempt of court as charged in Paragraph 1 of the Information and Petition for Criminal Contempt Order against Kenneth A. Kozel.

4. With respect to the second charged instance of criminal contempt, the Court finds that Defendant did receive actual notice of the January 20, 1989, 2:00 p.m. hearing before Chief Judge Harold A. Baker in the United States District Court in Danville, Illinois. Defendant concedes that he arrived at this hearing 40 minutes late, but he further testified, and this Court finds that testimony believable and credible, that he arrived at the hearing late

due to road construction. Hence, his late arrival was due to circumstances beyond his control, and he therefore lacked the requisite mental state to be found guilty of this charge. Therefore, the Court finds Defendant not guilty of criminal contempt of court as charged in Paragraph 3 of the Information and Petition for Criminal Contempt Order against Kenneth A. Kozel.

5. With respect to the third instance of charged criminal contempt, the Court finds that Chief Judge Harold A. Baker orally ordered Defendant, in open court and on the record, to appear on February 9, 1989, at 1:30 to show cause why he should not be held in contempt of court; the Court further finds that the Defendant willfully failed to appear as ordered. The Court credits the transcript, Government Exhibit 3, as an accurate and reliable account of the proceedings on January 20, 1989. The Court further finds that the court reporter who prepared the transcript, Toni Judd, is a trained and experienced court reporter, and finds

credible her testimony regarding the accuracy of the transcript. Conversely, the Court finds incredible Defendant's testimony that he did not hear the order of Court on that day. It is inconceivable that the Defendant would hear everything preceding and following the order of Court, but not the order itself. Finally, this Court finds that the order of Judge Mihm dated July 11, 1989, being Defendant's Exhibit 1, vacates only that portion of Judge Baker's minute order entered January 23, 1989, introduced as Government Exhibit 1-2, which dealt with the Rule 11 sanctions entered in the case Betts v. Wilson, et al., but did not vacate that portion of the minute order requiring Defendant to appear on February 9, 1989, at 1:30 p.m. Hence, this Court finds Defendant guilty of knowingly and willfully disobeying the January 20, 1989, oral order of Chief Judge Harold A. Baker by failing to appear as required on February 9, 1989, as charged in Paragraphs 4 and 5 of the Information and Petition for Criminal Contempt Order

against Kenneth A. Kozel.

6. Finally, Defendant has filed a memorandum supporting several objections raised during trial; this memorandum also raises certain objections for the first time. To the extent the memorandum readdresses matters raised during trial, this Court reaffirms our earlier rulings. To the extent this memorandum raises new issues, these are DENIED as untimely.

7. To the extent these written findings and conclusions conflict with our ruling from the bench, these written findings shall control.

Ergo, the Court hereby FINDS Defendant GUILTY of the offenses charged in Paragraphs 1, 4 and 5 of the Information and Petition for Criminal Contempt Order against Kenneth A. Kozel, but FINDS Defendant NOT GUILTY of the offense charged in Paragraph 3 of the Information and Petition for Criminal Contempt order against Kenneth A. Kozel. Further, matters raised for the first time in Defendant's

post-trial memorandum are DENIED AS UNTIMELY.

ENTER: 25 Sept. 1989.

FOR THE COURT:

/S/ RICHARD MILLS
RICHARD MILLS
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA

V.

KENNETH A. KOZEL

JUDGMENT INCLUDING SENTENCE UNDER THE SENTENCING REFORM ACT

Case Number 89-20015

John Betts
Defendant's Attorney

THE DEFENDANT:

pleaded guilty to count(s) _____
was found guilty on count(s) 1 and 3
after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Count Number(s)
T.18,Sec.401(3)	Criminal Contempt of Court	1 and 3

The defendant is sentenced as provided in pages 2 through 3 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

X The defendant has been found not guilty on count(s) 2, and is discharged as to such count(s)

__ Count(s) _____(is)(are) dismissed on the motion of the United States.

X The mandatory special assessment is included in the portion of this Judgment that imposes a fine.

__ It is ordered that the defendant shall pay to the United States a special assessment of $_____, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc.Sec.Number:

353-40-8077

Defendant's mailing address:
2nd at Joliet
La Salle, IL 61301

Defendant's residence address:
2nd at Joliet
La Salle, IL 61301

September 26, 1989
Date of Imposition of Sentence

/S/ RICHARD MILLS
Signature of Judicial Officer

RICHARD MILLS, U.S. DISTRICT JUDGE
Name & Title of Judicial Officer

September 26, 1989
Date

Defendant: KENNETH A. KOZEL
Case Number: 89-20015

FINE WITH SPECIAL ASSESSMENT

The defendant shall pay to the United States the sum of $630.00, consisting of a fine of $600.00 and a special assessment of $30.00.

X These amounts are the totals of the fines and assessments imposed on individual counts, as follows:
Count 1 - $100.00 fine and $25.00 Special Assessment
Count 3 - $500.00 fine and $5.00 Special Assessment

This sum shall be paid X immediately as to special assessments.
X as follows: as to fines, the deft. shall pay within 6 months.

X The Court has determined that the defendant does not have the ability to pay interest. It is ordered that:

X The interest requirement is waived.
— The interest requirement is modified as follows:

Defendant: KENNETH A. KOZEL
NUMBER: 89-20015

RESTITUTION, FORFEITURE, OR
OTHER PROVISIONS OF THE JUDGMENT

The defendant shall perform community service by requesting and accepting appointment in 5 criminal cases, misdemeanor or felony, in La Salle County, IL on a pro bono basis. The defendant shall complete this community service within 2 years and upon completion of each case shall submit a certification in writing to the U.S. Probation Office.

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
DANVILLE DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. KENNETH A. KOZEL, Defendant.	Case No. 89-20015

INFORMATION AND PETITION FOR CRIMINAL CONTEMPT ORDER AGAINST KENNETH A. KOZEL

The UNITED STATES OF AMERICA, by and through its attorneys, J. WILLIAM ROBERTS, United States Attorney for the Central District of Illinois, and Assistant United States Attorney FRANCES C. HULIN, informs and petitions this Court for an order finding KENNETH A. KOZEL in criminal contempt of court in violation of Title 18, United States Code, Section 401(3). In support thereof, it is stated as follows:

1. On or about May 12, 1988, KENNETH A. KOZEL appeared before the United States District Court for the Central District of Illinois in Danville, Illinois, in the case of Betts v. Wilson, No. 87-2375, without having been admitted to practice before that court in violation of Rule 1(E) of the Rules of the United States District Court, Central District of Illinois, effective April 1, 1987.

2. On or about January 20, 1989, KENNETH A. KOZEL again appeared before the United States District Court for the Central District of Illinois in Danville, Illinois, in the same case referred to in Paragraph 1, above, without having been admitted to practice before the court.

3. On or about January 20, 1989, KENNETH A. KOZEL, in appearing before the court, as referred to in Paragraph 2, above, was about forty (40) minutes late for the scheduled hearing in Betts v. Wilson, No. 87-2375.

4. On said January 20, 1989, when appearing before the court, KENNETH A. KOZEL was directed - in open court by Chief Judge Harold A. Baker - to appear before the court on February 9, 1989, at 1:30 p.m. to show cause why he should not be held in contempt.

5. On February 9, 1989, at 1:30 p.m. and thereafter, KENNETH A. KOZEL failed to appear (as directed on January 20, 1989) to show cause why he should not be held in contempt.

6. Each of the acts referred to in Paragraphs 1, 2, 3, and 5, above, constitutes an act of contempt and the willful and knowing disobedience of a lawful order of the court.

WHEREFORE, the UNITED STATES OF AMERICA petitions the court to enter an order finding KENNETH A. KOZEL in criminal contempt of

court in four instances or counts pursuant to Title 18, United States Code, Section 401(3).

Respectfully submitted,

J. WILLIAM ROBERTS
United States Attorney

By: /S/ Frances C. Hulin
Assistant United
States Attorney

United States Attorney
201 N. Vermilion, R. 310
Danville, IL 61832
217-446-8546

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	NO. 89-20015
	)	
KENNETH A. KOZEL,	)	
	)	
Defendant.	)	

ORDER

RICHARD MILLS, District Judge:

As a preliminary matter in this criminal contempt case, the Defendant, Kenneth A. Kozel, has asked this Court to disqualify itself from considering any matter involved in this

case. The Court has considered the written submissions of the parties, including Defendant's late-filed memorandum of law supporting his motion, and has also considered the arguments made in two hearings[1] on this motion. For the following reasons, this motion is denied.

Facts

This case has arrived at our doorstep as an offshoot to a civil action filed by Defendant's attorney, John A. Betts. Betts sued his ex-wife, her attorney and others in a lawsuit filed in the Danville Division of this Court. Originally Betts appeared pro se in his case, but as the litigation progressed he elicited the aid of our Defendant, Kenneth A. Kozel (both Betts and Kozel are attorneys). According to the Information and Petition for contrast, the other federal district courts within the Seventh Judicial Circuit have each enacted a rule explicitly requiring that attorneys be admitted to practice before appearing before the court, with the exception

of the Western District of Wisconsin. Defendant argues that he was never under an explicit obligation to be admitted to practice before this Court, and therefore cannot be convicted of practicing before this Court without having been admitted.

Prior Formed Opinion

Defendant's argument that this Court has already formed an opinion on this matter stems from two sources. First, Attorney Betts contacted this Court's Clerk's Office and discovered that this Court regularly checks our records to assure that attorneys appearing before the Court have been admitted to practice here. Second, Attorney Betts has called the Court's attention to an article appearing in the Streator, Illinois, Times Press of May 2, 1989, at 2, where a law clerk of this Court was quoted concerning the then current posture of this case. Defendant's assertion that these matters show that the Court has already formed an opinion on this question, however, has no merit.

As for the first contention, that this Court checks to see whether attorneys have been admitted to practice here has no bearing upon whether Defendant's case is controlled by our lecal rule. Defendant apparently will argue, as set out above, that no local rule explicitly requires an attorney to be admitted to this Court before practicing here. That we check to see whether an attorney appearing before us has been admitted to appear here in no way indicates that this Court has formed an opinion already upon whether our rule explicitly requires such admission. This question has not arisen before--no case before this Court has ever before concerned this apparent ambiguity in our Rules--and so it can hardly be said that our mere checkinq to see if an attorney has been admitted constitutes our opinion on this question.

Defendant's second contention on this point is equally untenable. It is true that the Court's law clerk was quoted in the newspaper article.[2] Nothinq in that article, how-

ever, in any way suggests that this Court, through its law clerk, has already formed an opinion on this case. To the contrary, the article clearly indicates that only matters of public record were mentioned by the law clerk. The first paragraph simply states the nature of this case, that is, that the Defendant has been "charged with contempt of court ... for allegedly appearing and arguing a case before the United States District Court in Danville without having been admitted to practice before that court." The third paragraph indicates that the law clerk stated that "so far no action has been taken on the filing." The last paragraph--the one Defendant highlights as indicating that this Court has already reached a decision--merely reiterates the rules for becoming admitted to practice in this Court; it in no way suggests any opinion as to whether such admission is or is not necessary.

As we made clear in discussing this issue from the bench on May 9, 1989, this Court's

law clerks are considered extensions of the judge. They are the eyes and the ears of the Court, and when the law clerks speak, they speak for this Court. Had this

U.S. Department of Justice

United States Attorney
Central District of Illinois
Headquarters Office
Springfield, IL 62705

September 12, 1989

Attorney Registration & Disciplinary Commission
1 N. Old Capital Plaza, Suite 345
Springfield, IL 62701

Re: Kenneth A. Kozel

Gentlemen:

Per my obligation to report such matters, I hereby inform the Attorney Registration & Disciplinary Commission that Attorney Kenneth A. Kozel of LaSalle, Illinois, was found guilty of two (2) counts of criminal contempt by United States District Judge Richard Mills in United States District Court, Springfield, Illinois, on September 6,1989.

Enclosed find a copy of the Information and Petition for Criminal Contempt Order Against Kenneth A. Kozel. The Government dismissed the allegations contained in Paragraph 2 of the Information prior to trial. Mr. Kozel was found not guilty of the allegation contained in Paragraph 3 of the Information. Mr. Kozel was found guilty of practicing before the United States District Court without having been admitted to the bar of

said Court (as alleged in Paragraph 1 of the Information) and of failing to appear as directed for a rule to show cause why he should not be held in contempt of court (as alleged in Paragraphs 3 and 4 of the Information).

The matter is set for September 26, 1989 at 1:30 p.m. before United States District Judge Richard Mills in United States District Court in Springfield, Illinois for post-trial motions and sentencing.

Feel free to contact me at 217-446-8546 for further information.

Very truly yours,

J. WILLIAM ROBERTS
United States Attorney

/S/ Thomas E. Karmgard
THOMAS E. KARMGARD

Enclosures

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

JOHN A. BETTS, Plaintiff,	)	
v.	)	NO. 89-1052
PAUL R. WILSON, et al, Defendants.	)	

ORDER

This court vacates Judge Baker's written MINUTE ORDER entered and docketed 1/23/89

(#32) and JUDGMENT IN A CIVIL CASE entered and docketed 1/23/89 (#33 .

ENTERED: NUNC PRO TUNC AS OF JULY 5, 1989

/S/ MICHAEL M. MIHM
JUDGE

CERTIFICATE OF SEARCH

I, John M. Waters, Clerk of the United States District Court for the Central District of Illinois, do hereby certify that the records in my four divisional offices (Peoria, Danville, Rock Island and Springfield) have been searched, and there is no record that Kenneth A. Kozel has ever been admitted to practice in this district.

In testimony whereof, I hereunto set my hand and affix the seal of said Court, at my office in Springfield this Fifteenth day of February, 1989.

/S/ John M. Waters
CLERK OF COURT

A TRUE COPY DATE: 2-15-89
ATTEST:
JOHN M. WATERS, CLERK
BY:
/S/ Christy Taylor
DEPUTY CLERK
U.S. DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

AMENDED CERTIFICATE OF SEARCH

I, John M. Waters, Clerk of the United States District Court for the Central District of Illinois, do hereby certify that a search of the records of the Clerk's Office of the U.S. District Court on March 7,1989, shows that Kenneth A. Kozel was admitted to practice in the Central District of Illinois on January 19, 1989. A previous search of the records, on or about February 14th, failed to reveal a record of Kenneth A. Kozel's admission to the Bar of the District.

In testimony whereof, I hereunto set my hand and affix the seal of said Court, at my office in Springfield this Tenth day of March, 1989.

/S/ John M. Waters
CLERK OF COURT

A TRUE COPY
ATTEST:

JOHN M. WATERS, CLERK
BY:
/S/ Karen Siser
DEPUTY CLERK
U.S. DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
DATE: 3-10-89

United States District Court
Northern District of Illinois
219 South Dearborn Street
Chicago, Illinois 60604

March 31, 1989

Mr. John A. Betts
470 Ryall Street
Marseilles, IL 61341

Dear Mr. Betts:

In response to your letter of February 15, I made an inquiry concerning the status of Jean Clark and Sandie Bogacz. As you indicated in your letter, they are not lawyers. It appears that they have been signing motions in Chapter 13 cases, and appearing on those motions, for a considerable period of time. The propriety of this was discussed by the Bankruptcy Judge-United States Trustee Liaison Committee in late 1988, and apparently Mr. Phelps was instructed at that time that he should be represented in court only by licensed attorneys. Attached hereto is a letter from Mr. Clifford L. Meacham, Assistant United States Trustee, addressed to Bankruptcy Judge Thomas James, explaining the action that was taken.

I do not know whether non-lawyers are still signing motions on behalf of Mr. Phelps in Chapter 13 cases, but I indicated to Judge James today my view that, if they are, that would constitute the practice of law. Judge James will request Mr. Meacham to relay this information to Mr. Phelps, and I assume there will be no problem in the future.

Thank you for bringing this matter to my attention. If you observe any further problems, please let me hear from you. I am sure that Chief Judge Schwartz of the bankruptcy court would also like to be advised.

(The reason I involved Judge James in this matter is that all of the other bankruptcy judges are at a conference and will not return until next week.)

Sincerely,

/S/ John F. Grady
John F. Grady

sas

cc: Hon. John D. Schwartz
Hon. Thomas James

United States District Court
Northern District of Illinois
219 South Dearborn Street
Chicago, Illinois 60604

Chambers of
John F. Grady
Chief Judge May 17, 1989

John A. Betts
Lawyer
470 Ryall Street
Marseilles, Illinois 61341

Re: Craig M. Phelps

Dear Mr. Betts:

This will acknowledge your letter of May 3, expressing the view that the matter of Craig Phelps and his staff should be referred to the United States Attorney's Office for possible prosecution. If you believe that a criminal offense has occurred, I suggest that you report it to the United States Attorney. As far as the court is concerned, I see no need for further action.

Very truly yours,

/S/ John F. Grady
John F. Grady
Chief Judge

JFG/cb

cc: Hon. John Schwartz
Hon. Thomas James

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
PEORIA DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. KENNETH A. KOZEL, Defendant.	)	No. 89-20015-01 J U R Y D E M A N D E D

A P P E A R A N C E

I, the undersigned Attorney, hereby enter my appearance on behalf of the named Defendant herein. Trial by jury demanded.

/S/ John A. Betts
John A. Betts
Attorney for Kenneth A. Kozel
470 Ryall Street
Marseilles, Illinois
61341
Tel. (815) 795-6101

A TRUE COPY
ATTEST:
JOHN M. WATERS,CLERK
BY
/S/ Mary Ann Benga
DEPUTY CLERK
U.S.DISTRICT COURT
CENTRAL DISTRICT
OF ILLINOIS DATE: Jan. 12, 1990

Certificate of Service

I, the undersigned, hereby certify that I mailed a copy of this Appearance to:

Frances C. Hulin
Assistant United States Attorney
201 N. Vermillion R. 310
Danville, Illinois 61832

by enclosing the same in a postage prepaid envelope and depositing it in a U.S. Mail Chute at Marseilles, Illinois, the 6th day of March, 1989.

Dated: March 6, 1989 /S/ John A. Betts
John A. Betts